ABDUL MAJID HJ NAZARDIN & ORS

v.

PAARI PERUMAL

COURT OF APPEAL, KUALA LUMPUR
GOPAL SRI RAM JCA
ABDUL KADIR SULAIMAN JCA
ALAUDDIN MOHD SHERIFF JCA
[CIVIL APPEAL NO: W-04-22-2001]
7 MARCH 2002

CIVIL PROCEDURE: *Appeal - Interference by appellate court - Findings of fact - Circumstances when appellate court should interfere - Whether appellate court exceeded its function*

LABOUR LAW: *Employment - Probationer - Probationary period expired but probationer not confirmed - Entitlement of annual leave only upon confirmation but probationer granted such leave - Whether plaintiff a confirmed employee - Whether High Court judge made correct finding of fact - Whether plaintiff entitled to increment - Quantum of damages to be awarded*

The plaintiff was employed as a clerk in the defendants' firm of solicitors on a probationary three-month period. The plaintiff continued working after the probationary period had expired and was even granted annual leave on six occasions. Under the terms of his letter of appointment, the plaintiff would only be entitled to such leave if he were a confirmed employee. However, when the defendants failed to pay the plaintiff the increment which he would be entitled to receive had he been a confirmed employee, he resigned and commenced an action for breach of contract. The learned magistrate dismissed the action, and the plaintiff appealed to the High Court, which intervened and reversed the learned magistrate's decision. Hence, this appeal by the defendants to reverse the High Court's judgment and restore the learned magistrate's decision.

Held:
Per Gopal Sri Ram JCA

[1] An appellate court does not exceed its function if, in an appropriate case, it reverses conclusions of fact which are inconsistent with the fair inferences that are to be drawn from proved or admitted facts. The learned High Court judge did not exceed the bounds of this principle, hence the appeal against liability accordingly failed. (p. 137 c)

[2] By acting towards the plaintiff as if he were a confirmed employee *eg*, by giving him the annual leave, the defendants were taking a position or must be deemed to have taken the position that the plaintiff was confirmed; once this finding that the plaintiff was a confirmed employee had been correctly made by the learned High Court judge, it followed that the plaintiff would be entitled to the increment claimed. (p 137 e & g)

[2a] As the plaintiff had been in the defendant's employment for only nine months, the award of 13 months' salary less the mitigated sum smacked of punitive damages and was too severe a punishment upon the defendants. With regard to the totality of the circumstances, a reasonable period of notice in this case would have been three months; the learned High Court judge's award was accordingly substituted. (p 138 a-b)

[Appeal partially allowed. Costs to the plaintiff.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Plaintif telah diambil bekerja sebagai seorang kerani di firma peguamcara defendan-defendan atas tempoh percubaan selama tiga bulan. Plaintif terus bekerja selepas tempoh percubaan luput dan telah juga diberikan cuti tahunan sebanyak enam kali. Di bawah terma-terma surat perlantikan beliau, plaintif hanya berhak kepada cuti yang sedemikian jika beliau adalah seorang pekerja yang telah disahkan. Walaubagaimanapun, apabila defendan-defendan gagal untuk membayar plaintif kenaikan yang beliau berhak kepada sekiranya beliau merupakan pekerja yang disahkan, beliau telah meletakkan jawatan dan memulakan satu tindakan untuk kemungkiran kontrak. Majistret yang bijaksana telah menolak tindakan tersebut, dan plaintif merayu kepada Mahkamah Tinggi, yang telah mencelah dan mengakaskan keputusan majistret yang bijaksana. Oleh itu, telah menyebabkan rayuan ini oleh defendan-defendan untuk mengakaskan penghakiman Mahkamah Tinggi dan menempatkan semula keputusan majistret tersebut.

Diputuskan:
Oleh Gopal Sri Ram HMR

[1] Sesebuah mahkamah rayuan tidak melampaui fungsinya jika, dalam sesuatu kes yang wajar, ianya mengakaskan kesimpulan-kesimpulan fakta yang tidak konsisten dengan inferen adil yang harus dibuat daripada fakta-fakta yang diakui dan terbukti. Hakim Mahkamah Tinggi yang bijaksana tidak melampaui lingkungan prinsip ini, oleh itu menyebabkan rayuan terhadap tanggungan gagal sehubungan itu.

[2] Dengan bertindak terhadap plaintif seolah-olah beliau adalah seorang yang telah disahkan iaitu dengan memberikan beliau cuti tahunan, defendan-defendan mengambil pendirian atau semestinya dianggap sebagai telah berpendirian bahawa plaintif telah disahkan; sebaik sahaja keputusan ini bahawa plaintif adalah seorang kakitangan yang disahkan telah dibuat dengan betulnya oleh hakim Mahkamah Tinggi yang bijaksana, didapati bahawa plaintif akan berhak kepada kenaikan yang dituntut.

[2a] Oleh kerana plaintif telah berkhidmat dengan defendan selama hanya sembilan bulan, award gaji 13 bulan ditolak jumlah yang dikurangkan mempunyai unsur gantirugi kewangan dan adalah hukuman yang amat keterlaluan terhadap defendan-defendan. Berhubung dengan keadaan tersebut secara keseluruhannya, satu tempoh notis yang berpatutan dalam kes ini sepatutnya selama tiga bulan; award hakim Mahkamah Tinggi yang bijaksana sehubungan itu digantikan.

[Rayuan dibenarkan sebahagiannya; kos kepada plaintif.]

Case(s) referred to:

KC Matthews v. Kumpulan Guthrie Sdn Bhd [1981] 1 CLJ 40; [1981] CLJ (Rep) 62 ***(dist)***

Sivalingam Periasamy v. Periasamy & Anor [1996] 4 CLJ 545 ***(foll)***

V Subramaniam & Ors v. Craigielea Estate [1982] 1 MLJ 317 ***(dist)***

For the appellants - Thavalingam Thavarajah (Haslina Hassan); M/s Zaid Ibrahim & Co

Respondent - In person

[Appeal from High Court, Kuala Lumpur; Civil Appeal No: R2-11-71-1999]

Reported by Suresh Nathan

JUDGMENT

Gopal Sri Ram JCA:

Contrary to the submissions of counsel for the appellants, this appeal raises no point of law of any importance. It is a decision peculiar to its own facts. Those facts may be shortly narrated.

The respondent (whom we shall refer to as the plaintiff) worked as a clerk in the appellants' firm of solicitors. He commenced employment on 2 February 1994. This is what his letter of appointment says in its material portions:

a) Salary at RM1,100 per month;

b) Office hours: Monday to Friday – 9am to 5.30pm

Saturday – 9am to 1pm

c) Annual leave: Fourteen (14) days to be applied within seven days in advance and to be taken at times convenient to our firm. (Applicable upon confirmation)

d) Probation period – Three (3) months.

So, the plaintiff was to be a probationer for three months. After the expiry of that period, he could either be confirmed or shown the door. Neither happened here.

At the end of the probationary period, the plaintiff continued working and the defendants continued to pay him his salary. Additionally, they granted him annual leave on six occasions after the expiry of the probation period. As may be seen from the terms of his letter of appointment, the plaintiff would only be entitled to such leave if he were a confirmed employee.

The defendants did not pay the plaintiff the increment which he would be entitled to receive had he been a confirmed employee. The plaintiff continued to work for a period of about nine months after his period of probation expired. He gave evidence at the trial that he had made several demands for the increment he felt he was justly entitled to have. Since he did not get it, he left the employment. He resigned his position. He did so on 30 January 1995. His last drawn salary as at that date was RM1,100. The plaintiff then proceeded to look for alternative employment. He eventually found a job on 1 June 1996. In the meantime, he had commenced an action for breach of contract in the Magistrate's Court at Kuala Lumpur.

The learned magistrate who heard the case dismissed the action. The plaintiff appealed to the High Court, which intervened, reversed the magistrate's decision and entered judgment for the plaintiff and awarded him 13 months salary less the mitigated gain of RM500 obtained from his new employment. A further sum of RM900 was also awarded for the loss of nine months increment. The defendants now ask this court to reverse the High Court's judgment and to restore the learned magistrate's decision.

We have perused the record most carefully and we find, as did the learned judge, that the learned magistrate had fallen into serious error in arriving at her decision. It is unnecessary for us to enumerate the instances in which she failed to draw the proper inferences from the unchallenged evidence and admitted facts adduced before her. All the learned judge did, as he was obliged

to do, was to draw the inferences which ought to have been properly drawn from the proved and admitted facts. He surely cannot be faulted for doing that. Accordingly, we find no merit in the arguments advanced by Mr. Thavalingam that there had been unwarranted intervention in the instant case.

This court has on several occasions summarised the instances in which appellate intervention may be warranted. One of these instances is conveniently encapsulated in the joint judgment delivered by this court in *Sivalingam a/l Periasamy v. Periasamy & Anor* [1996] 4 CLJ 545.

At the risk of repetition, we emphasise that an appellate court does not exceed its function if, in an appropriate case, it reverses conclusions of fact which are inconsistent with the fair inferences that are to be drawn from proved or admitted facts. We are satisfied that the learned judge did not exceed the bounds of this principle. The appeal against liability accordingly fails.

We now turn to the question of quantum. The first head of damages we address is the award of RM900 made by the learned judge. Now, the point here is simple enough. Either the plaintiff was a probationer when he left or he was not. By acting towards the plaintiff as if he were a confirmed employee, eg, by giving him the leave to which we referred to earlier, the defendants were taking a position or must be deemed to have taken the position that the plaintiff was confirmed. That is an inference a reasonable tribunal will draw from the facts. It follows that the authorities strenuously advanced before us namely *KC Matthews v. Kumpulan Guthrie Sdn. Bhd.* [1981] 1 CLJ 40; [1981] CLJ (Rep) 62 and *V. Subramaniam & Ors v. Craigielea Estate* [1982] 1 MLJ 317 do not apply to the facts and circumstances of the present instance. In those cases, there was not the kind of conduct that is to be found here. They are therefore readily distinguishable. It follows from what we have said thus far, that once the finding has been made, correctly by the learned judge, that the plaintiff was a confirmed employee, it follows as night follows day, that he would be entitled to the increment claimed. We therefore find no merit in the complaint that the RM900 should not have been awarded and we affirm the learned judge's decision on this point.

We now turn to consider the complaint in respect of the award made for the period of non-employment. The contract between the plaintiff and the defendant as evidenced in the employment letter provides for no period of notice. In such a case, as this, then the proper principle to be applied is plainly obvious. It is that the plaintiff is entitled to reasonable notice. What is reasonable depends on the facts and circumstances of each case. The fact that the plaintiff did or did not attempt to mitigate is relevant but not conclusive.

On the facts before us, the plaintiff had been in the defendants' employment for only nine months. To award him 13 months salary less the mitigated sum smacks of punitive damages. It is far too severe a punishment upon the defendants. Having regard to the totality of the circumstances, we consider that a reasonable period of notice in this case would have been three months. If that period of notice had been given at the appropriate time after 30 April 1994, we do not think that the plaintiff would have had any ground for complaint. Accordingly, we would set aside the learned judge's award of RM12,200 and substitute it with an award of RM3,600.

Now for the question of costs. Mr Thavalingam frankly concedes, as he is driven to, that his memorandum of appeal makes no specific complaint about the issue of damages. What he was actually seeking to do was to obtain a complete reversal of the High Court's judgment and a restoration of the magistrate's order. Taking into account the fact that he has failed in this attempt, it would not be fair to order costs against the plaintiff in this court. We would therefore order costs against the defendants and in favour of the plaintiff in this court.

The appeal is allowed to the limited extent already indicated. The deposit is to be paid to the respondent to account of taxed costs. For completeness, costs at all level are awarded to the respondent. The orders of the judge in all other respects are confirmed.